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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. ~~8-111~~ - 49

**THE ATCHISON, TOPEKA AND SANTA FE
RAILWAY COMPANY;
CHICAGO AND NORTH WESTERN
RAILWAY COMPANY; et al.,**

Appellants,

vs.

ELVIN L. REDDISH, et al.,

Appellees.

Appeal from the United States District
Court for the Western District of
Arkansas, Fort Smith Division

STATEMENT AS TO JURISDICTION

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STATEMENT AS TO JURISDICTION

The District Court's opinion is reported at 188 F. Supp. 160, the report of the Interstate Commerce Commission at 81 M.C.C. 35. The Commission is taking a separate and concurrent appeal, in *Interstate Commerce Commission v. Reddish*, from the same judgment from which this appeal is taken, and copies of the opinions below, attached to the Commission's jurisdictional statement, are incorporated herein by reference.

This action was brought by appellee Reddish under 28 U.S.C. §§ 1336, 1398, 2284, and 2321 to 2325, to set aside an order of the Interstate Commerce Commission.

The judgment of the District Court annulling the order was dated and entered October 19, 1960. Notice of appeal was filed in that Court by these appellants December 16, 1960.

Jurisdiction of the Supreme Court to review this judgment by direct appeal is conferred by 28 U.S.C. §§ 1253 and 2101 (b).

The following cases sustain the Court's jurisdiction: *Alton Railroad Co. v. United States*, 315 U.S. 15, 18-20 (1942); *United States v. Interstate Commerce Commission*, 337 U.S. 426, 432 (1949).

STATUTES INVOLVED

This appeal is concerned largely with the construction of sections 203(a)(15) and 209(b) of the Interstate Commerce Act, 49 U.S.C. §§ 303(a)(15), 309(b), as amended in 1957, 71 Stat. 411. These are set forth in the Appendix hereto. The textual changes made by the 1957 amendment are shown in italics.

QUESTIONS PRESENTED

1. Whether under the 1957 amendments to section 209(b) of the Interstate Commerce Act the District Court was in error in holding that adequacy of existing service may not be considered by the Interstate Commerce Commission in evaluating the effect upon supporting shippers of a grant or denial of contract carrier rights.

2. Whether the District Court erred in holding that the Commission, in determining whether issuance of a permit under Section 209(b) is consistent with the public interest

and the National Transportation Policy, is required to consider the lower rates proffered by a contract carrier applicant, even assuming the evidence of record before the Commission will support a finding that the lower rates result from economies and advantages inherent in the contract carrier's operation.

3. Whether the District Court when substituting its judgment for that of the Interstate Commerce Commission in weighing the evidence of record erred in concluding that the supporting shippers required a special service not provided by common carriers.

STATEMENT OF THE CASE

Appellant Interstate Commerce Commission by the order here involved denied an application by appellee Reddish for a permit as a contract carrier by motor vehicle under § 209(b) as amended in 1957. The District Court annulled the denial order and remanded the cause to the Commission for further proceedings consistent with the Court's opinion. The Commission, certain motor common carriers, and the railroads filing this jurisdictional statement, took separate appeals from the District Court's judgment. The appellant motor common carriers and railroads were protesting parties before the Commission and were intervening defendants supporting the Commission's order in the District Court. The United States filed a brief in District Court supporting Reddish.

THE QUESTIONS ARE SUBSTANTIAL

This is a case of first impression. The amendments of 1957 were adopted after lengthy consideration by Congress, following the decision of this Court in *United States v. Contract Steel Carriers*, 350 U.S. 409 (1956). Other mat-

ters of importance were also dealt with in the amendments in addition to those immediately arising from that decision. The District Court gave the amended sections a construction not in accord with their plain language and in conflict with principles laid down by this Court in construing similar statutes. It accomplished this result by disregarding the words of the amendments and by resorting to legislative history. The Court erred in going to legislative history, and, moreover, when this history is examined it does not support the Court's conclusions. The questions involved are of vital interest to all carriers and shippers and need to be decided by this Court.

CONSTRUCTION OF § 209(b)

Section 209(b), as amended in 1957 (see Appendix), authorizes issuance of a contract carrier permit upon proof that the proposed operation will be "consistent with the public interest and the national transportation policy." The section further provides that in determining this issue the Commission shall consider five criteria, among them "the effect which granting the permit will have upon the services of the protesting carriers and the effect which denying the permit would have upon the applicant and/or its shipper." As will be shown hereinafter, these are familiar tests commonly applied in the regulation of carriers.

The Commission, upon ample and adequate evidence, determined that granting the permit would have an adverse effect upon the protesting carriers, that denial would not adversely affect the applicant, and that since the existing services of protesting carriers were adequate to meet the supporting shippers' needs denial would not adversely affect the shippers.

The first, and basic, reason assigned by the District Court for setting aside the order was that the statute does not authorize denial upon the ground that the services of existing carriers are adequate. 188 F. Supp. p. 165. The Court did not reach this conclusion by construing the plain words of the statute, which, as we will show, are clear and well understood terms heretofore construed by this Court in such fashion as to support the Commission. Instead, the Court abandoned the plain statutory terms and excavated from legislative history material which, it thought, made the order unlawful. In this the Court committed two errors: (1) It resorted to legislative history to construe a statute so plain on its face as not to be open to extrinsic construction; and (2) it misapplied the legislative history, which, even when resorted to, does not sustain the Court's conclusion.

The criterion of § 209(b), "the effect which denying the permit would have upon the . . . shipper" (or user of service) has long been a central and basic test to be resolved where entry into a regulated business requires government authorization. *And deciding that issue inextricably involves whether existing service is adequate, that is, whether additional service is needed.* In its first regulated entry case, *Texas & Pacific Ry. Co. v. Gulf, Colorado & Santa Fe Ry. Co.*, 270 U.S. 266 (1926), involving railroad versus railroad competition, the Court said:

"[Congress] recognized . . . that the building of unnecessary lines involves a waste of resources and that the burden of this waste may fall upon the public; that competition between carriers may result in harm to the public as well as in benefit; and that when a railroad inflicts injury upon its rival, it may be the public which bears the loss. . . ." (p. 277)

" . . . For invasion through new construction of territory adequately served by another carrier, like

the establishment of excessively low rates in order to secure traffic enjoyed by another, may be inimical to the national interest." (p. 278)

The statute there construed, § 1(18) of the Act, 49 U.S.C. § 1(18), required proof of "public convenience and necessity" before building a new line of railroad. No criteria of "public convenience and necessity" were specified in the statute, but the Court held that that phrase included some of the tests which have now been explicitly stated in the 1957 amendment. Thus what the Court said in the foregoing excerpts comprehends:

"... the effect which granting the permit would have upon the services of the protesting carriers and the effect which denying the permit would have upon the applicant and/or its shipper. . . ."

The Court's statement summarizes the concepts of the "effect which denying" (or granting) "the permit would have upon the . . . shipper" (the public) in the event of "invasion of territory adequately served by another carrier." Thus the "effect upon the shipper" cannot be disassociated from the "adequacy of existing service;" it is impossible to assay the "effect upon the shipper" without considering the "adequacy of existing service."

In other cases the Court has also made it clear that the issue of "the effect which denying the permit would have upon the . . . shipper" is inseparable from or identical with the issue whether the services of existing carriers are adequate.¹

¹ *Western Pacific Calif. R. Co. v. Southern Pacific Co.*, 284 U. S. 47, 52 (1931); *Claiborne-Annapolis Ferry Co. v. United States*, 285 U.S. 382, 392 (1932); *Interstate Commerce Commission v. Parker*, 326 U.S. 60, 68-69 (1945); *Schaffer Transportation Co. v. United States*, 355 U.S. 83, 90-91 (1957); *American Trucking Assns. v. United States*, 355 U.S. 141, 153 (1957).

Thus the Commission correctly held that in following the command of § 209(b) to "consider . . . the effect which denying the permit would have upon the . . . shipper," it must take into account the adequacy of existing service. And the District Court erred in holding, 188 F. Supp. p. 165, that the adequacy of service test "is a test proscribed by the legislative history" of the 1957 amendment to § 209(b).

LEGISLATIVE HISTORY

The District Court refused to give effect to the plain meaning of the terms of § 209(b) because it thought they were modified by legislative history. The Court erred in going to the legislative history at all since the well settled meaning of the specific criteria of § 209(b), as shown above, does not permit recourse to legislative history.¹ However, for the purpose of showing that the legislative history relied upon by the Court does not support the Court's conclusion, we now turn to that history (S. Rep. No. 703, 85th Cong., 1st Sess.).

As originally proposed in 1957 § 203(a)(15) would have defined a contract carrier as one engaged

" . . . under continuing contracts with one person or a limited number of persons for the furnishing of transportation services of a special and individual nature required by the customer and not provided by common carriers."

Section 209(b) as originally proposed would have required proof

¹ *Morrisette v. United States*, 342 U.S. 246, 263 (1952); *Packard Motor Co. v. National Labor Relations Board*, 330 U.S. 485, 492 (1947); *Gemsco v. Walling*, 324 U.S. 244, 260 (1945); *Ex Parte Collett*, 337 U.S. 55, 61 (1949).

“... that existing common carriers are unwilling or unable to provide the type of service for which a need has been shown.”

These provisions were deleted after objection by the contract carriers and others. In the place of the proposed language of § 209(b) there were substituted the five criteria specified in the bill as passed; and the present § 203(a)(15) (see Appendix) replaced the proposed version. The Commission approved these deletions and substitutions.

From this history the Court concludes that the Commission lacks power to deny Reddish's application on the ground that denial will not adversely affect the shippers because the existing services of protesting carriers are adequate. It is plain that the Court erred in so holding.

It is of course true that the deleted provisions would have authorized the Commission to deny the Reddish application. But it does not follow that the Commission lacks this power under the bill as passed. Actually the amended act with the five criteria of § 209(b) confers much broader discretion than the proposed language. The original terms would have required an *automatic* denial if it appeared that common carriers were at the time of the hearing or at some appropriate future time willing and able to provide the service needed. As passed the Act does not require automatic denial, but it clearly does grant administrative discretion on a more comprehensive scale to deny an application in a proper case where, as here, authorization would adversely affect existing carriers and would not adversely affect shippers because existing service is adequate. The substitution of administrative discretion within the five criteria for the automatic denial originally proposed does not mean that the Commission is powerless to deny an application in a proper case under the specified criteria.

The whole tenor of the legislative history is against the Court's conclusion. Summing up the purpose of the bill as finally presented and passed Report No. 703 said in its last paragraph:

"Your committee is of the opinion that the public interest in a sound transportation system, and *particularly in a stable and adequate system of common carriage*, in the light of the objectives of the national transportation policy, require that the bill, as amended, be passed." (Emphasis supplied)

Assuredly in the light of that declaration it cannot be said that the Senate Committee intended to shackle the Commission in the fashion determined by the Court.

RATES QUESTION

The Commission found that the shippers' dissatisfaction with the less-than-truckload rates of motor common carriers is not a sufficient basis to justify grant of the application under the evidence in this case. The District Court agreed that the prospect of lower contract carrier rates is not necessarily determinative in a case of this type. But the Court held that in view of its earlier conclusions, which we have discussed above, the Commission had failed to give the rate matter adequate consideration. It is clear that the Court did not make the rate question an independent ground for annulling the order, but that what the Court said about this issue was dependent upon and interlocked with its conclusion as to the construction of the Commission's statutory authority. The case therefore cannot be decided without resolving the issue of the proper construction of § 209(b).

In this connection it is noteworthy that this Court equated, as in the interest of the shipping public, denial

based on adequacy of existing service with denial based on proposed rate-cutting, in *Texas & Pacific Ry. Co. v. Gulf, Colorado & Santa Fe Ry. Co.*, *supra*, 270 U.S. 266, 278.

EVALUATIONS OF THE EVIDENCE

In division IV of its opinion the Court concluded, upon its own examination of the evidence, that the Commission erred (1) in deciding from the evidence that granting the application would have an adverse effect upon the protesting common carriers, and (2) in failing to give consideration to evidence of special services which could not be supplied by a common carrier. The Court does not cite any evidence to support its conclusions. In the absence of anything more than the Court's recital of its own conclusions it is clear that the Court has not given adequate reasons to overturn the Commission's findings and actions with which the Court disagrees. Moreover, these considerations all turn upon and are interlocked with the question of statutory construction.

CONCLUSION

The questions presented are so substantial as to require plenary consideration, with briefs on the merits and oral argument, for their resolution.

Respectfully submitted,

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APPENDIX

Sections 203(a)(14)(15) and 209(b) of the Interstate Commerce Act, 49 U. S. C. § 303(a)(14)(15), 309(b).

Sec. 203(a)(14). The term "common carrier by motor vehicle" means any person which holds itself out to the general public to engage in the transportation by motor vehicle in interstate or foreign commerce of passengers or property or any class or classes thereof for compensation, whether over regular or irregular routes, except transportation by motor vehicle by an express company to the extent that such transportation has heretofore been subject to chapter 1 of this title, to which extent such transportation shall continue to be considered to be and shall be regulated as transportation subject to chapter 1 of this title.

Sec. 203(a)(15) as amended in 1957.

(15). The term "contract carrier by motor vehicle" means any person which engages in transportation by motor vehicle of passengers or property in interstate or foreign commerce, for compensation (other than transportation referred to in paragraph (14) of this section and the exception therein), under continuing contracts with one person or a limited number of persons either (a) for the furnishing of transportation services through the assignment of motor vehicles for a continuing period of time to the exclusive use of each person served or (b) for the furnishing of transportation services designed to meet the distinct need of each individual customer.

Former § 203(a)(15)

(15). The term "contract carrier by motor vehicle" means any person which, under individual contracts or agreements, engages in the transportation (other than transportation referred to in paragraph (14) of this section and the exception therein) by motor vehicle of passengers or property in interstate or foreign commerce for compensation.

Sec. 209(b) as amended in 1957. Parts added by the 1957 amendment are shown in italics. 71 Stat. 411.

§ 209(b). Applications for such permits shall be made to the Commission in writing, be verified under oath, and shall be in such form and contain such information and be accompanied by proof of service upon such interested parties as the Commission may, by regulations, require. Subject to section 310 of this title, a permit shall be issued to any qualified applicant therefor authorizing in whole or in part the operations covered by the application, if it appears from the applications or from any hearing held thereon, that the applicant is fit, willing, and able properly to perform the service of a contract carrier by motor vehicle, and to conform to the provisions of this chapter and the lawful requirements, rules, and regulations of the Commission thereunder, and that the proposed operation, to the extent authorized by the permit, will be consistent with the public interest and the national transportation policy declared in the Interstate Commerce Act; otherwise such application shall be denied. *In determining whether issuance of a permit will be consistent with the public interest and the national transportation policy declared in the Interstate Commerce Act, the Commission shall consider the number of shippers to be served by the applicant, the nature of the service proposed, the effect which granting the permit would have upon the services of the protesting carriers and the effect which denying the permit would have upon the applicant and/or its shipper and the changing character of that shipper's requirements.* The Commission shall specify in the permit the business of the contract carrier covered thereby and the scope thereof, and it shall attach to it at the time of issuance, and from time to time thereafter, such reasonable terms, conditions, and limitations, consistent with the character of the holder as a contract carrier, *including terms, conditions and limitations respecting the person or persons and the number or class thereof*

for which the contract carrier may perform transportation service, as may be necessary to assure that the business is that of a contract carrier and within the scope of the permit, and to carry out with respect to the operation of such carrier the requirements established by the Commission under section 204(a)(2) and (6) of this title: Provided, That within the scope of the permit and any terms, conditions or limitations attached thereto, the carrier shall have the right to substitute or add to its equipment and facilities as the development of its business may require: Provided further, That no terms, conditions or limitations shall be imposed in any permit issued on or before August 22, 1957 which shall restrict the right of the carrier to substitute similar contracts within the scope of such permit; or to add contracts within the scope of such permit unless upon investigation on its own motion or petition of an interested carrier the Commission shall find that the scope of the additional operations of the carrier is not confined to those of a contract carrier as defined in section 203(a)(15) of this title, as in force on and after August 22, 1957.